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Metropolitan Sewers.

Opinion of Mr. Henderson and Mr. Bovill.

We think that the relation between the Commissioners and their subordinates does not import the liability which the law implies from the relation between master and servant, and between principal and agent. The public being the master or principal, the Commissioners are but the instruments for carrying the public purpose into effect; the subordinates, though appointed and controlled by the Commissioners, are themselves servants of the public, and therefore the rule of "respondeat superior" does not affect the Commissioners with responsibility for the faults or defaults of those whom they nominate to perform duties incident to their jurisdiction.

The irresponsibility of public officers for the misconduct of their subordinates has been long established. It was recognized in the case of Lane *v.* Cotton (12th Will. III.) as to the Postmaster-General, and again in Whitfield *v.* Lord de Spencer, and also in Nicholson *v.* Mounsey, in which it was held that the Captain of a Royal Ship is not answerable for the negligence of his Lieutenant. The Commissioners in the present case like the Captain and Lieutenant in the case cited are, in the words of Lord Ellenborough, "servants of one common master."

1 Ld. Raym. 646—S. C. 1 Salk. 17. Cowper, 754. 15 East, 384.

The principle is illustrated by the decisions on contracts of public officers. Thus a bill filed against George Burgoyne for specific performance of an agreement relative to Artillery Carriages in America was dismissed with costs by Lord Thurlow, who observed that the plaintiff had his remedy against the Crown by petition of right. So when Lord North was sued as First Lord of the Treasury for expenses incurred in raising a regiment for the public service, Lord Mansfield overruled the action. So a Commissary is not liable for forage supplied by his directions; nor the governor of a colony on contracts made by him in that character.

1 T. R. 178—181.

1 T. R. 172. Renevin *v.* Wolseley, T.R. 674.

The principle, on which this irresponsibility rests, evidently does not apply to persons associated for purposes of gain, even though "incorporated," nor to cases where the servants of the public are directly parties to a wrongful act or default; and, therefore it consists with the decisions in Matthews *v.* West London Waterworks Company—Leader *v.* Moscan—and Jones *v.* Bird.

3 Campb. N. P. C. 403. 2 Blk. Rep. 924—S. C. 3 Wils. 461. 5 Barn & Ald. 837.

The other cases cited in page 3 afford express authority for the application of this principle to a case like the present, and show it to be no less consistent with natural justice and public policy than with a strict legal rule.

If the Commissioners are not liable, neither is their Expenditor-Clerk, or any subordinate other than the actual offender. This was admitted in Hall *v.* Smith.

2 Bingh. R. 156.

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We are of opinion, therefore, that under the circumstances stated neither the Commissioners collectively or severally, nor their Clerk or Expenditor can be made responsible for the neglect of the Sluice-Keeper. The details of the accident in the New Road are not stated; but if, as is most likely, the fault if any, which led to the accident, was that of some one employed by the Commissioners, the same doctrine applies.

Mandamus would certainly not be granted to direct compensation which the Commissioners are not bound to make. The 69th section is in terms confined to compensation for damage "by reason of the exercise of any of the powers of this Act," and clearly does not reach the case of damage arising from the negligence or other fault of individuals. No other authority to compensate is conferred. No fund applicable to any other damage is provided. To apply to the relief of sufferers from the misconduct of the officers any of the funds entrusted to the Commissioners would, we think, involve no less a violation of the trust reposed, than the application of those funds to any purpose of mere charity. For damage arising from the exercise of any of the statutory powers it is the right and the duty of the Commissioners to make compensation. For damages resulting from the misconduct of individuals the injured party should be left to his remedy against the actual tort-feasors.

2 Bingh. R. 69.

It appears to us that the Commissioners, collectively and individually, are irresponsible while acting within the scope of their powers. For consequential injury arising from what the legislature has authorized them to do they are not liable. Acts beyond their jurisdiction would be invalid; and, if injurious, actionable: but even as to them, the Commissioners are protected by the 128th section from *personal* liability, provided the Act were done *bona fide* for the purpose of executing the Statute.

Boulton *v.* Crowther. 2 Barn and Cress. 783.

In the case suggested of appointing to office a person known to be unfit for it, or improperly neglecting to take due security, or of any other actual breach of duty, no doubt the Commissioners would be responsible for whatever injury they thereby occasioned.

(Signed) J. HENDERSON,
W. BOVILL.

Temple, 31*st January*, 1849.

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